
COMMENT

(UN)JUSTIFIABLE?: A COMPARISON OF ELECTORAL DISCRIMINATION JURISPRUDENCE AT THE EUROPEAN COURT OF HUMAN RIGHTS AND THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

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I. INTRODUCTION

From 1992 to 1995, ethnic groups in Bosnia and Herzegovina (“BiH”) waged the most lethal conflict in Europe since World War II.¹ BiH was the most ethnically heterogeneous of the former

1. See Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327 (1995) (arguing that failure to intervene in the conflict in Bosnia and Herzegovina (“BiH”) would result in the continued subjection of Bosnians to mass atrocities); see also U.N. Secretary-General, *Report of the Secretary-General on the United Nations Mission in Bosnia and Herzegovina*, ¶ 6, U.N. Doc. S/2002/1314 (Dec. 2, 2002) (estimating that the war resulted in 200,000 deaths, 20,000 missing persons, and 1.2 million internally displaced persons). But see *The Conflicts*, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/322> (last visited Oct. 12, 2012) (estimating the number of casualties from the war at closer to 100,000).

Yugoslavia's six republics,² and as Yugoslavia began to split along ethno-nationalist lines, with Croatia and Serbia each staking a claim to BiH territory, BiH erupted into war.³ The armed conflict between BiH's three main ethnic groups (Bosniaks, Serbs, and Croats) concluded with the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina ("Dayton Peace Agreement") on December 4, 1995.⁴

The Dayton Peace Agreement included a new Constitution for BiH.⁵ The drafters of this Constitution created a governmental structure based on power-sharing and political segregation of ethnic groups with the objective of avoiding future violent conflict and maintaining sustainable peace.⁶ The Constitution recognizes three "constituent peoples" of BiH: the Serb, Croat, and Bosniak (the term that refers to Bosnian Muslims) ethnic groups.⁷ It also creates two

2. Robert M. Hayden, *Imagined Communities and Real Victims: Self-Determination and Ethnic Cleansing in Yugoslavia*, 23 AM. ETHNOLOGIST 783, 787 (1996) (describing BiH as the only former Yugoslav country that contained no clear majority ethnic group).

3. See VESNA PESIC, U.S. INST. OF PEACE, SERBIAN NATIONALISM AND THE ORIGINS OF THE YUGOSLAV CRISIS 8 (1996) (noting that Serb nationalism and Croat separatism were two oppositional forces that drove the former Yugoslavia into violent conflict). See generally LAURA SILBER & ALLAN LITTLE, YUGOSLAVIA: DEATH OF A NATION (1996) (providing a comprehensive overview of the causes of the conflict in the Balkans).

4. See General Framework Agreement for Peace in Bosnia and Herzegovina, Bosn. & Herz.-Croat.-Rep. Yugo., Dec. 14, 1995, 35 I.L.M. 75 (bringing the war to an end and creating, with the assistance of the international community, the new state of Bosnia and Herzegovina).

5. See *id.* Annex 4 (annexing a new Constitution for BiH to the Dayton Peace Agreement); see also James C. O'Brien, *The Dayton Constitution of Bosnia and Herzegovina*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 332, 337 (Laurel E. Miller ed., 2010) (remarking that international lawyers, and particularly those from the United States (US) and Europe, played a significant role in drafting the new Constitution).

6. See *Stranka za Bosnu i Hercegovinu v. Pilav* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Sept. 29, 2006, No. AP-2678/06 at 10 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=67930 (citing the Dayton Peace Agreement and noting that BiH's uniquely discriminatory state structure was created to preserve peace among the ethnic groups).

7. See USTAV BOSNE I HERCEGOVINE [USTAV BiH] [CONSTITUTION] pmbI. (1995) (Bosn. & Herz.) [hereinafter BOSN. & HERZ. CONSTITUTION] (recognizing Bosniaks, Croats, and Serbs as "constituent peoples" and citizens of BiH, and recognizing all "Others" as merely citizens); see also *The World Factbook: Bosnia*

semi-autonomous territorial “entities” within BiH: the Federation of Bosnia and Herzegovina (“the Federation”) and the Republika Srpska (“RS”).⁸ The Constitution provides that election to the House of Peoples, the smaller of two parliamentary chambers,⁹ and the Presidency is dependent on both ethnic and territorial status.¹⁰ Today, the governmental structure created at Dayton amounts to constitutionally mandated discrimination that is no longer justified under the current conditions in BiH.¹¹

Bosnian citizens have challenged this discrimination as incompatible with BiH’s European human rights obligations at the BiH Constitutional Court.¹² In 2006, the BiH Constitutional Court

and Herzegovina, U.S. CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/bk.html> (last updated Dec. 17, 2012) (drawing a distinction between Bosniaks (or Bosnian Muslims, who comprise approximately 48.3% of the population of BiH), Croats (most of whom are Roman Catholics, at 15% of the population), Serbs (most of whom are Orthodox Christians, at 34% of the population), and other minority groups (2.3% of the population)).

8. See BOSN. & HERZ. CONSTITUTION, *supra* note 7, arts. I, III (dividing BiH into two entities—the Federation of Bosnia and Herzegovina (“the Federation”) and the Republika Srpska (“RS”)—each of which have their own set of responsibilities independent of the BiH state government); see also ANDY AITCHISON, MAKING THE TRANSITION: INTERNATIONAL INTERVENTION, STATE-BUILDING AND CRIMINAL JUSTICE REFORM IN BOSNIA AND HERZEGOVINA 44, 46–47 (2011) (remarking that by 1997, Serb-dominated RS was ethnically-homogeneous, but the Federation was split between Bosniaks and Croats, with a clear Bosniak majority).

9. See BOSN. & HERZ. CONSTITUTION, *supra* note 7, art. IV (providing that the House of Peoples has fifteen delegates, comprised of five Serbs elected from the RS, five Bosniaks elected from the Federation, and five Croats elected from the Federation).

10. See *id.* art. V (creating a tripartite Presidency, with one Serb elected from the RS, one Bosniak elected from the Federation, and one Croat elected from the Federation).

11. See, e.g., Sejdić & Finci v. Bosnia & Herzegovina, Apps. Nos. 27996/06 & 34836/06, 2009 Eur. Ct. H.R. 1, 33 (citing as evidence of dramatically improved peace and stability in BiH: the transformation of the ethnic armed forces into a small state military in 2005; accession to NATO’s Partnership for Peace in 2006; the signing and ratification of an EU Stabilisation and Association Agreement in 2008; constitutional reform regarding the status of the Brcko District in 2009; and election to the UN Security Council for a two-year period in 2010).

12. See BOSN. & HERZ. CONSTITUTION, *supra* note 7, art. VI (granting the BiH Constitutional Court jurisdiction to determine whether any law in BiH is compatible with the Constitution and/or the European Convention on Human Rights and Fundamental Freedoms (“European Convention”).

held in *Appeal of the Party for Bosnia and Herzegovina and Mr. Ilijaz Pilav* (“*Pilav*”) that electoral discrimination under the Constitution is still justified due to current conditions in BiH and the ethnically divided nature of BiH’s internal order.¹³ Shortly thereafter, two Bosnians applied directly to the European Court of Human Rights (“European Court”) to challenge the discriminatory provisions.¹⁴ The European Court held that the provisions regarding election to the House of Peoples and the Presidency in the BiH Constitution are unjustifiably discriminatory.¹⁵ In January 2010, the Parliamentary Assembly of the Council of Europe issued a Resolution compelling BiH to implement the constitutional reforms requested in *Sejdić and Finci* prior to the October 2010 election.¹⁶ As of December 17, 2012, the decision has yet to be implemented.¹⁷

13. *Stranka za Bosnu i Hercegovinu v. Pilav* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Sept. 29, 2006, No. AP-2678/06 at 9 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=67930 (stating that an electoral system must account for political, historical, and cultural context).

14. See *Sejdić & Finci*, 2009 Eur. Ct. H.R. 1 (deciding whether the BiH authorities’ decision to bar Dervo Sejdić, a Roma, and Jakob Finci, a Jew, from election to the BiH Presidency and House of Peoples on account of their respective ethnicities constituted discrimination under the European Convention); see also AZRA ŠEHIĆ ET AL., JUSTICE NETWORK IN BOSN. & HERZ., ACCESS TO JUSTICE IN BOSNIA & HERZEGOVINA: COLLECTION OF PUBLIC POLICY ANALYSES IN THE FIELD OF JUDICIARY 63–64 (2011) (explaining that Sejdić began petitioning the BiH authorities to allow him to run for office in 2003 and decided to sue BiH directly before the European Court rather than the BiH Constitutional Court after seeing the latter’s decision in *Pilav*).

15. See *Sejdić & Finci*, 2009 Eur. Ct. H.R. at 33 (holding that positive developments in BiH over the past fifteen years have rendered constitutionally-sanctioned electoral discrimination unjustifiable).

16. See Eur. Parl. Ass., *Res. 1701 (2010): Functioning of Democratic Institutions in Bosnia and Herzegovina*, ¶¶ 2–5 (Jan. 26, 2010) [hereinafter Eur. Parl. Ass., *Res. 1701*], available at <http://www.assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=17800&Language=EN> (expressing disappointment that all constitutional reform initiatives to date had failed, and urging BiH authorities to compromise on reforms prior to the October 2010 elections, lest the elections be held in contravention of the European Convention).

17. See Press Release, Delegation of the European Union to Bosn. & Herz., Statement on the Implementation of the *Sejdić and Finci* Ruling (Dec. 23, 2011), available at <http://www.delbih.ec.europa.eu/News.aspx?newsid=30&lang=EN> (articulating dismay that as of December 22, 2011, the BiH parliamentary committee tasked to *Sejdić and Finci* implementation had not yet introduced constitutional amendments in Parliament); see also Aida Cerkez, *Bosnian Minorities Push for Right to Be Prez*, ASSOCIATED PRESS, Mar. 31, 2012, available

This Comment compares electoral discrimination under BiH and European law by analyzing the *Pilav* and *Sejdić and Finci* cases. Part II(A) of this Comment discusses the relevant BiH constitutional provisions in more detail and the BiH Constitutional Court's jurisprudence with regard to those provisions, particularly in *Pilav*.¹⁸ Part II(B) describes anti-discrimination provisions of the European Convention on Human Rights and its Protocols ("European Convention"), to which BiH is a party, and the jurisprudence of the European Court with regard to those provisions; this section highlights the *Sejdić and Finci* case, in which the European Court ruled that the provisions of the BiH Constitution relating to election to the House of Peoples and the Presidency violate the European Convention.¹⁹

Part III will examine why *Pilav* (in the BiH Constitutional Court) and *Sejdić and Finci* (in the European Court), two fundamentally similar cases, had such different outcomes in the two courts.²⁰ Specifically, Part III(A) will argue that the BiH Constitutional Court erred in its application of European Court discrimination jurisprudence, and could have found electoral discrimination in the *Pilav* case.²¹ Nevertheless, as Part III(B) will argue, the BiH Constitutional Court would have been justified in dismissing *Pilav*'s claim based on lack of jurisdiction.²² Part III(C) will argue that if the

at http://www.newsvine.com/_news/2012/03/31/10953530-bosnian-minorities-push-for-right-to-be-prez (reporting that the BiH Parliamentary Commission responsible for *Sejdić and Finci* implementation missed another deadline in March 2012).

18. See discussion *infra* Part II(A) (explaining that electoral discrimination in the Constitution of BiH and the Election Law was originally justified due to interethnic tensions following the 1992–1995 war in BiH, which has subsequently been upheld by the BiH Constitutional Court in several cases, most recently in *Pilav*).

19. See discussion *infra* Part II(B) (explaining that Protocol 12 to the European Convention and the European Court's interpretation of it in *Sejdić and Finci* have expanded the concept of non-discrimination under European law).

20. See discussion *infra* Part III (postulating that though the BiH Constitutional Court would have been justified in dismissing *Pilav*'s claim based on lack of jurisdiction, its reasoning with regard to the merits of the case was flawed, and the European Court would decide the case differently).

21. See discussion *infra* Part III(A) (arguing that the BiH Constitutional Court should have applied the European Court's discrimination standard rather than its electoral rights standard).

22. See discussion *infra* Part III(B) (arguing that because the Constitutional

European Court took the *Pilav* case, it would decide in favor of Pilav.²³

Part IV recommends actions for the European Court, the Council of Europe, and the European Union to take toward eliminating electoral discrimination in BiH.²⁴ First, it recommends that the European Court take the *Pilav* case, which is currently pending before the Court, and use it as an opportunity to clarify its jurisprudence with regard to the scope of Protocol 12.²⁵ Second, it urges the Council of Europe and European Union to be more assertive in compelling BiH toward constitutional reform.²⁶

II. BACKGROUND

A. ELECTION BASED ON ETHNICITY IN BiH

The Dayton Peace Agreement, which brought the war in BiH to an unstable end in December 1995, created a new Constitution and state structure based on power-sharing mechanisms.²⁷ The peculiar electoral system that resulted from this agreement is a reflection of the demands that had to be met during the peace negotiations before the warring ethnic groups—the Bosniaks, Croats, and Serbs, known

Court has held that it does not have the authority to judge the compliance of the BiH Constitution with the European Convention, it would have been justified in dismissing Pilav's claim on this basis).

23. See discussion *infra* Part III(C) (explaining the similarities between the *Sejdić and Finci* and *Aziz* cases and the *Pilav* case, and noting that the European Court would find discrimination in the latter case based on its analysis in the former cases).

24. See discussion *infra* Part IV (recommending that the European Court take Pilav's case and rule in his favor and that the European Community take concrete steps to compel implementation of *Sejdić and Finci* in BiH).

25. See discussion *infra* Part IV(A) (suggesting that the European Court should not wait for BiH to implement *Sejdić and Finci* before taking the *Pilav* case and recommending that the court rule that the issue in *Pilav* also constitutes discrimination under Protocol 12).

26. See discussion *infra* Part IV(B) (advocating that, as a member of the Council of Europe, BiH has an obligation to ensure that its Constitution conforms to the European Convention and should now be threatened with suspension after ten years of failing to do so).

27. See Anna Morawiec Mansfield, Note, *Ethnic but Equal: The Quest for a New Democratic Order in Bosnia and Herzegovina*, 103 COLUM. L. REV. 2052, 2055 (2003) (remarking that the Dayton Peace Agreement may have ended the war, but it did not create peace).

as the “constituent peoples” of BiH²⁸—were willing to end the armed conflict and attempt to share power under a unitary state government.²⁹ As a result, electoral rights in BiH are tied to both ethnicity and citizenship within one of BiH’s two semi-autonomous entities.³⁰ Bosnian citizens have challenged the relevant constitutional provisions as discriminatory, but the BiH Constitutional Court has declined to invalidate the provisions, both on the basis of lack of jurisdiction³¹ and on the basis that differential treatment in BiH is still reasonably justified.³²

*1. Election to the House of Peoples and the Presidency
Under the Constitution of BiH*

Election to both the House of Peoples and the Presidency in BiH is dependent on both ethnicity and entity citizenship.³³ The House of

28. See BOSN. & HERZ. CONSTITUTION, *supra* note 7.

29. See Ronald C. Slye, Comment, *The Dayton Peace Agreement: Constitutionalism and Ethnicity*, 21 YALE J. INT'L L. 459, 460 (1996) (stating that the “preservation of ethnic identity” has taken priority over preservation of peace and stability in post-war BiH); see also Paul C. Szasz, *The Dayton Accord: The Balkan Peace Agreement*, 30 CORNELL INT'L L.J. 759, 762 (1997) (observing that the Serbs preferred a highly decentralized state with autonomous and ethnically-homogenous entities, the Bosniaks and Croats desired a strong, unified, centralized state, and the resulting agreement aligned more with the international community’s objectives than those of any ethnic group).

30. See BOSN. & HERZ. CONSTITUTION, *supra* note 7, arts. IV–V (providing that power in the House of Peoples and the Presidency is shared equally between Bosniaks and Croats elected from the Federation and Serbs elected from the RS, to the exclusion of Bosniaks and Croats from the RS, Serbs from the Federation, and all “Other” minorities).

31. See Tihic [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Mar. 31, 2006, No. U-5/04 at 7 (Bosn. & Herz.), *available at* http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=37994 (holding that the BiH Constitutional Court lacked jurisdiction to determine whether provisions of the BiH Constitution were compatible with the European Convention).

32. See *Stranka za Bosnu i Hercegovinu v. Pilav* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Sept. 29, 2006, No. AP-2678/06 at 10 (Bosn. & Herz.), *available at* http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=67930 (recognizing that differential treatment mandated by the State with regard to electoral rights is justified as necessary to preserve peace in BiH).

33. See BOSN. & HERZ. CONSTITUTION, *supra* note 7, arts. IV–V (mandating that one Bosniak and one Croat from the Federation and one Serb from the RS compose the Presidency of BiH and that five Croats and five Bosniaks from the Federation and five Serbs from the RS comprise the House of Peoples).

Peoples is the smaller of two parliamentary chambers.³⁴ It exists primarily to provide a veto power that each group of constituent people may invoke to strike down legislation deemed harmful to its interests.³⁵ Article IV of the Constitution provides a strict ethnic and territorial breakdown for the House of Peoples, which is shared equally among Serbs from the RS, Bosniaks from the Federation, and Croats from the Federation, to the exclusion of Serbs from the Federation, Bosniaks and Croats from the RS, and ethnic minorities.³⁶

Article V of the Constitution provides for a tripartite Presidency, in which each member represents the majority ethnic group of the Entity from which he or she was elected.³⁷ As with the House of Peoples, members of the Presidency may veto any executive decisions that threaten the interests of their respective ethnic groups.³⁸ Serbs living in the Federation, Bosniaks and Croats living in the RS, and members of other ethnic minorities may not run for election to the Presidency.³⁹

34. *See id.* art. IV (creating a bicameral legislature with a larger House of Representatives, where election is based on entity citizenship, and a smaller House of Peoples, where election is based both on ethnicity and entity citizenship).

35. *See id.* (providing that all decisions of the Parliamentary Assembly may be reversed by a majority vote of the members of one ethnic group in the House of Peoples). *But see* European Comm'n for Democracy Through Law, *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative*, Doc. No. CDL-AD (2005) 004, 9–10 (Mar. 11, 2005) [hereinafter Venice Commission Opinion], available at <http://www.venice.coe.int/docs/2005/CDL-AD%282005%29004-e.pdf> (finding that the vital interest veto creates political deadlock, and recommending the abolition of the House of Peoples because it serves no legitimate governmental purpose aside from guaranteeing that the special interests of the constituent peoples will be protected).

36. *See* BOSN. & HERZ. CONSTITUTION, *supra* note 7, art. IV (stating that delegates to the House of Peoples shall be elected indirectly from the entities, with five Bosniaks and five Croats elected from the House of Peoples of the Federation, and five Serbs elected from the National Assembly of the RS).

37. *See id.* art. V (providing that members of the Presidency are elected directly from their respective entities: one Serb from the RS, one Bosniak from the Federation, and one Croat from the Federation).

38. *See id.* (providing that the Croat and Bosniak members of the Presidency must refer their veto decisions to their respective ethnic caucuses in the House of Peoples of the Federation for confirmation of the veto, and that the Serb member must refer veto decisions to the National Assembly of the RS for confirmation of the veto).

39. *See id.* (providing that only Bosniaks, Croats, and Serbs have seats in the Presidency); *see also* Venice Commission Opinion, *supra* note 35, at 11 (observing

2. BiH's European Human Rights Obligations

The Constitution's provisions regarding election to the House of Peoples and the Presidency conflict with BiH's European human rights obligations.⁴⁰ In 2002, BiH became a member of the Council of Europe, and ratified the European Convention and its Protocols.⁴¹ The European Convention provides prohibitions against discrimination in both Article 14⁴² and Article 1 of Protocol 12,⁴³ and guarantees electoral rights in Article 3 of Protocol 1.⁴⁴ At the time of its accession to the Council of Europe, BiH also pledged to review, within one year, its electoral legislation in light of the European Convention standards, to revise its legislation where necessary, and to continually review the compatibility of all legislation with the European Convention.⁴⁵ The Constitutional Court of BiH and the European Court differ in opinion as to whether the BiH Constitution is now in compliance with BiH's European Convention obligations.⁴⁶

that, as with the House of Peoples, the purpose of the tripartite Presidency is the protection of constituent peoples' interests).

40. See Venice Commission Opinion, *supra* note 35, at 5 (noting that many leaders in BiH are aware that the House of Peoples and Presidency provisions are discriminatory and in violation of the European Convention).

41. See *Sejdić & Finci v. Bosnia & Herzegovina*, Apps. Nos. 27996/06 & 34836/06, 2009 Eur. Ct. H.R. 1, 34 (noting that as part of its Council of Europe accession obligations, BiH is required to continually check the compatibility of its laws with the European Convention).

42. See European Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention] (providing a prohibition against discrimination regarding the rights set forth in the European Convention and its Protocols).

43. See *id.* at Protocol No. 12, art. 1 (prohibiting discrimination with regard to any right set forth in any law).

44. See *id.* at Protocol No. 1, art. 3 (guaranteeing free and regular elections by secret ballot for legislative representatives).

45. See Eur. Parl. Ass., *Bosnia and Herzegovina's Application for Membership of the Council of Europe*, Doc. No. 9286, ¶ 15 (Nov. 20, 2011) (providing a list of Council of Europe standards and Conventions with which BiH was obligated to conform after accession to the Council of Europe).

46. Compare *Stranka za Bosnu i Hercegovinu v. Pilav* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Sept. 29, 2006, No. AP-2678/06 at 10–11 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=67930 (holding that Articles IV and V of the BiH Constitution do not constitute electoral discrimination under the European Convention), with *Sejdić & Finci v. Bosnia & Herzegovina*, Apps. Nos. 27996/06 & 34836/06, 2009 Eur. Ct. H.R. 1, 38–39 (holding that Articles IV and V of the BiH Constitution violate Article 14, Article 3 of Protocol 1, and Article 1 of

3. *The BiH Constitutional Court's Jurisprudence on Electoral Discrimination: Pilav*

The BiH Constitutional Court has limited jurisprudence on electoral discrimination under the Constitution, as it has only directly addressed the issue in one case: *Pilav*.⁴⁷ In two cases prior to *Pilav*, the Court refused to decide the electoral discrimination claims on the merits based on procedural grounds.⁴⁸ In 2004, Mr. Sulejman Tihic, the Chair of the Presidency of Bosnia and Herzegovina, challenged the compatibility of Article IV (on election to the House of Peoples) and Article V (on election to the Presidency) of the Constitution with the non-discrimination provisions of the European Convention.⁴⁹ Tihic argued that these provisions unjustifiably discriminated against Serbs in the Federation, Bosniaks and Croats in RS, and all "Others" in prohibiting their election to these offices.⁵⁰

In 2006, the Constitutional Court dismissed Tihic's case for lack of jurisdiction, noting that because the Court's primary purpose is to uphold the Constitution, deciding whether the Constitution conforms to the European Convention is outside the scope of its jurisdiction.⁵¹

Protocol 12 to the European Convention).

47. See *Pilav*, No. AP-2678/06 at 4–5 (deciding whether the constitutional provisions regarding election to the House of Peoples and the Presidency violated provisions prohibiting discrimination under the European Convention, guaranteeing electoral rights under the International Covenant on Civil and Political Rights, and guaranteeing equal protection before the law for minorities under the General Convention for Protection of National Minorities).

48. See Tihic [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Mar. 31, 2006, No. U-5/04 at 1 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=37994 (holding that the Constitutional Court of BiH did not have jurisdiction in this case); Tihic (*Tihic II*) [Ustavni Sud BiH] (Constitutional Court of Bosnia and Herzegovina) May 26, 2006, No. U-13/05 at 1 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=43087 (rejecting the action for lack of jurisdiction in the Constitutional Court of BiH).

49. See *Tihic*, [Constitutional Court of Bosnia & Herzegovina] No. U-5/04 at 1–2 (claiming that these constitutional provisions violate the right to be elected to the legislature guaranteed by Article 3 of Protocol 1 to the European Convention taken in conjunction with the Article 14 prohibition against discrimination).

50. See *id.* at 5–6 (requesting that the Court compel the Parliamentary Assembly to revise the contested articles of the Constitution and bring them in line with the European Convention).

51. See *id.* at 7 (explaining that granting itself additional powers, such as the power to determine the compatibility of the Constitution with the European Convention, is outside of the Constitutional Court's jurisdiction).

In 2005, Mr. Tihic similarly challenged the compatibility of the Election Law, which is based on the provisions pertaining to elections in the Constitution, with the European Convention. The Court rejected the request on the same grounds as the previous case.⁵²

In 2006, the BiH Constitutional Court addressed an individual challenge to the presidential election provisions of the Constitution and the Election Law in *Pilav*.⁵³ Mr. Pilav was a Bosniak citizen of the RS who ran for election to the Serb seat of the Presidency.⁵⁴ In *Pilav*, the Constitutional Court upheld decisions by the Central Electoral Commission and the Court of BiH rejecting Mr. Pilav's request.⁵⁵

Mr. Pilav argued that his inability to run for the Presidency on behalf of the RS violated Article 1 of Protocol 12 to the European Convention,⁵⁶ and the Court rejected his claim.⁵⁷ Relying on European Court precedent on electoral rights (under Article 3 of Protocol 1) rather than discrimination (under Article 14) in its

52. See *Tihic II*, No. U-13/05 at 5 (holding that because the provisions on election to the House of Peoples and the Presidency in the Election Law are derived directly from the Constitution, and the Constitutional Court is not competent to decide whether the Constitution is compatible with the European Convention, the Constitutional Court is not competent to decide whether the Election Law is compatible with the European Convention).

53. See *Stranka za Bosnu i Hercegovinu v. Pilav* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Sept. 29, 2006, No. AP-2678/06 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=67930 (deciding the case on its merits, rather than dismissing it for lack of jurisdiction as the Court did in the *Tihic* cases).

54. See Matt Robinson & Daria Sito-Sucic, *Two Decades from War, a New Fight to Save Bosnia*, REUTERS, Apr. 4, 2012, available at <http://uk.reuters.com/article/2012/04/04/uk-bosnia-war-idUKBRE8330GH20120404> (reporting that as a survivor of the Srebrenica massacre, in which Serb soldiers killed 8,000 Bosniak men and boys, Mr. Pilav is challenging the Constitution because it enshrines the ethnic cleansing of the war into law).

55. See *Pilav*, No. AP-2678/06 at 4 (noting that Mr. Pilav's application for certification to run for election to the Presidency did not adhere to the requirements of Article V of the Constitution and Article 8.1 of the Election Law).

56. See *id.* at 8 (arguing that the rights and freedoms of the European Convention apply directly in BiH under Article II(2) of the Constitution and have priority over other laws, including the BiH Constitution).

57. See *id.* at 12 (holding that Mr. Pilav's rights under the European Convention and its Protocols were not violated because there was a reasonable and objective justification for his differential treatment under the BiH Constitution).

reasoning, the Court held that Pilav's inability to run for any of the three seats in the Presidency was reasonably justified.⁵⁸

B. NON-DISCRIMINATION AND ELECTORAL RIGHTS UNDER THE EUROPEAN CONVENTION AND EUROPEAN COURT JURISPRUDENCE

The European Court of Human Rights analyzes electoral discrimination claims using three provisions of the European Convention and its Protocols: Article 14,⁵⁹ Article 3 of Protocol 1,⁶⁰ and Article 1 of Protocol 12.⁶¹ Through its jurisprudence on discrimination generally and electoral discrimination specifically, the European Court has established tests to determine whether differential treatment qualifies as discrimination.⁶² In *Sejdić and Finci*, the Court both broadened the scope of the prohibition on discrimination under European law, and narrowed the scope of justifications that states may raise in defense of discrimination, particularly with regard to ethnic discrimination.⁶³

58. *See id.* at 10–11 (arguing that differential treatment is still necessary to preserve peace and create conditions that could eventually foster a change in the constitutional structure of BiH).

59. *See* European Convention, *supra* note 42, art. 14 (providing a prohibition on discrimination to ensure the rights enumerated in the European Convention).

60. *See id.* at Protocol No. 1, art. 3 (providing for electoral rights with regard to the legislature).

61. *See id.* at Protocol No. 12, art. 1 (providing a general prohibition on discrimination under any law).

62. *See, e.g.,* Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium, 6 Eur. Ct. H.R. (ser. A) at 31, 34 (1968) (establishing that discrimination occurs where differential treatment has no “objective and reasonable justification”; this means that it does not pursue a “legitimate aim,” and the means used to pursue that aim are not proportionate to the aim).

63. *See* *Sejdić & Finci v. Bosnia & Herzegovina*, Apps. Nos. 27996/06 & 34836/06, 2009 Eur. Ct. H.R. 1, 35–36 (finding a violation of Article 1 of Protocol 12 and holding that while analysis under this provision will follow the analysis used for Article 14, protection under this provision will not be restricted to the rights set forth in the European Convention as it is under Article 14); *see also* Lindsey E. Wakely, Note, *From Constituent Peoples to Constituents: Europe Solidifies Fundamental Political Rights for Minority Groups in Sejdić v. Bosnia*, 36 N.C. J. INT'L L. & COM. REG. 233, 247 (2010) (arguing that the European Court, as demonstrated in *Sejdić and Finci*, is requiring an increasingly narrow fit between the aim of discriminatory treatment and the means used to achieve that aim).

*1. Non-Discrimination and Electoral Rights
Under the European Convention*

The European Convention prohibits discrimination in Article 14, which guarantees equality in relation to the enjoyment of the substantive rights provided in the European Convention.⁶⁴ The provision of the European Convention that addresses electoral rights is Article 3 of Protocol 1, which pertains only to elections to a legislature.⁶⁵ The rights to both vote and stand for election are inherent in this provision.⁶⁶ Prior to its decision in *Sejdić and Finci*, the European Court had only considered electoral discrimination cases brought under Article 3 of Protocol 1 in conjunction with Article 14.⁶⁷ In an effort to broaden the scope of non-discrimination under the European Convention,⁶⁸ Article 1 of Protocol 12 to the European Convention expands the prohibition on discrimination to cover any right guaranteed by any law.⁶⁹

64. See European Convention, *supra* note 42, art. 14 (providing that the rights “set forth in this European Convention on Human Rights” are guaranteed without discrimination).

65. See *id.* at Protocol No. 1, art. 3 (providing for free and regularly-scheduled elections with confidential voting, which will guarantee “the free expression of the opinion of the people in the choice of the legislature”).

66. See *Sukhovetsky v. Ukraine*, 2006-VI Eur. Ct. H.R. 193, 206 (holding that though Article 3 of Protocol 1 only refers to the right to vote in free elections, the right to stand for election is implied in this provision as well; explaining further, however, that this right is not absolute, and states have broad discretionary power in deciding who may stand for election).

67. See *Wakely*, *supra* note 63, at 251–52 (describing the European Court’s Article 14 jurisprudence generally and noting that because *Sejdić and Finci* complained of electoral discrimination with regard to the Presidency, Article 3 of Protocol 1 did not apply, so *Sejdić & Finci* was the first case in which the European Court considered electoral discrimination under Protocol 12).

68. See *generally Explanatory Report on Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 2000, ETS No. 177, ¶¶ 20–21, available at <http://conventions.coe.int/Treaty/EN/Reports/Html/177.htm> (clarifying that Article 1 of Protocol 12 provides a general prohibition on discrimination with regard to any right, and is intended to provide broader protection than Article 14, which is limited to the rights set forth in the European Convention).

69. See European Convention, *supra* note 42, at Protocol No. 12, art. 1 (providing that “any right set forth by law” is guaranteed without discrimination). *But see* EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS & EUROPEAN COURT OF HUMAN RIGHTS, HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW 57, 63 (2011) [hereinafter HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW] (explaining that though the prohibition on discrimination in Protocol 12 applies

2. *European Court Jurisprudence on Non-Discrimination and Electoral Rights: Belgian Linguistics Case, Aziz v. Cyprus, and Sejdić and Finci*

The European Court has limited case law on discrimination due to the fact that Article 14 of the European Convention must be read in conjunction with other substantive provisions of that instrument and the court will not address a claim of discrimination where it is able to find a violation under another substantive provision.⁷⁰ The cases below illustrate the Court's jurisprudence on discrimination under Article 14 generally, and specifically with regard to electoral discrimination under Article 14 in conjunction with Article 3 of Protocol 1 and Article 1 of Protocol 12 in conjunction with Article 3 of Protocol 1.

The European Court conducted one of its first comprehensive analyses of Article 14 in the *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium* ("Belgian Linguistics Case").⁷¹ In this case, the Court held in part that Belgian authorities violated Article 14 with Article 2 of Protocol 1 (the right to education) by discriminating against French-speaking students living in the Dutch-speaking region of Belgium.⁷² In its analysis, the Court set forth a two-part test for Article 14 that it continues to apply today: discrimination occurs where (1) similarly situated individuals are treated differently and (2) that differential treatment has no "objective and reasonable justification," which means that it does not pursue a "legitimate aim," and "there is no reasonable relationship of proportionality

more broadly to all national laws, relatively few states have ratified Protocol 12 as compared with the European Convention generally, with the result that different European states are now held to different standards vis-à-vis European non-discrimination law).

70. See HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW, *supra* note 69, at 60 (explaining that if the European Court finds a violation of a substantive right under the European Convention, it will not examine a discrimination claim based on the same set of facts).

71. See *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 6 Eur. Ct. H.R. (ser. A) at 34 (1968) (explaining that because it had not yet provided a comprehensive analysis of Article 14, the Court was basing its reasoning on that of "legal practice" in democratic states).

72. See *id.* at 65–66 (claiming that French students received differential treatment with respect to entrance requirements and the degrees they could obtain).

between the means employed and the aim sought to be realised.”⁷³

With regard to electoral discrimination, until *Sejdić and Finci*, the European Court had only considered cases under Article 3 of Protocol 1 in conjunction with Article 14 because the only electoral discrimination claims brought were those pertaining to election to a legislature.⁷⁴ Of those cases, the Court only found an Article 14 violation where the discrimination in question was a “fundamental aspect of the case,” as it did in *Aziz v. Cyprus*.⁷⁵ Under Article 3 of Protocol 1, the Court gives a wide margin of deference to states in setting up their electoral systems, reasoning that states should be able to determine for themselves who is qualified to vote and run for office.⁷⁶ Where electoral rights claims under Article 3 of Protocol 1 are not brought in conjunction with discrimination claims under Article 14, the Court will give states an even wider margin of deference.⁷⁷

Where a claim under Article 3 of Protocol 1 is brought in conjunction with a discrimination claim under Article 14, the Court will typically address only the former claim.⁷⁸ This is because the

73. *See id.* at 31 (noting that this test will also take into account the distinct features of each state in question and the freedom that national authorities have in choosing the means by which they conform to the standards set forth in the Convention).

74. *See, e.g.,* *Podkolzina v. Latvia*, 2002-II Eur. Ct. H.R. 443, 449 (claiming a violation of Article 3 of Protocol 1 with Article 14 concerning election to the Latvian Parliament).

75. *See, e.g.,* *Aziz v. Cyprus*, 2004-V Eur. Ct. H.R. 201, 214 (finding a violation of Article 14 in conjunction with Article 3 of Protocol 1 where the applicant was denied the ability to vote in any parliamentary election based on ethnicity and domicile).

76. *See Mathieu-Mohin & Clerfayt v. Belgium*, 113 Eur. Ct. H.R. (ser. A) at 23 (1987) (noting that electoral rights are not absolute because states are granted the discretion to make restrictions when setting up electoral systems). *But see* *Sukhovetsky v. Ukraine*, 2006-VI Eur. Ct. H.R. 193, 210 (warning that “[t]his margin of appreciation, however, goes hand in hand with European supervision”).

77. *See, e.g.,* *Ždanoka v. Latvia*, 2006-IV Eur. Ct. H.R. 29, 77–78 (holding that Latvia did not violate Article 3 of Protocol 1 where a candidate could not run for public office if he or she participated in Communist activities after January 1991); *Gitonas & Others v. Greece*, 1997-IV Eur. Ct. H.R. 1217, 1236 (holding that Greece did not violate Article 3 of Protocol 1 with regard to electoral restrictions on the ability to run for Parliament if the candidate held public office in the previous three years).

78. *See Mathieu-Mohin & Clerfayt*, 113 Eur. H.R. Rep. (ser. A) at 26 (declining to analyze the Article 14 claims because there was no violation of

Court uses a similar test for substantive electoral rights claims and discrimination claims, with one minor difference: under discrimination claims, a court must first determine whether similarly situated individuals receive differential treatment, then analyze whether the state has an objective and reasonable justification for the treatment (a legitimate aim and means proportionate to that aim).⁷⁹ In contrast, under electoral rights claims, the Court first asks whether restrictions on the rights in question weaken the rights to the extent that they are no longer effective, before determining whether there was a legitimate aim for the restrictions and proportionality between the restrictions and the aim.⁸⁰ Therefore, once the Court finds a violation of electoral rights, it is usually satisfied that the analysis need not proceed further.⁸¹ Conversely, if the Court does not find a violation of Article 3 of Protocol 1, it is unlikely to proceed to the Article 14 claim at all.⁸²

However, the Court affords special protection in cases where distinctions are based on race or ethnicity.⁸³ In *Aziz v. Cyprus*, the Court found a violation of Article 14 in conjunction with Article 3 of

Article 3 of Protocol 1 based on the same set of facts).

79. See *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 6 Eur. Ct. H.R. (ser. A) at 34 (1968) (adding that national authorities will be granted a margin of discretion with regard to the means pursued, because each society is different).

80. See *Mathieu-Montin & Clerfayt*, 113 Eur. H.R. Rep. (ser. A) at 23–24 (noting that the objective of this test is to determine whether citizens ultimately can still exercise their freedom to choose their representatives).

81. See *Podkolzina v. Latvia*, 2002-II Eur. Ct. H.R. 443, 460–61 (finding a violation of Article 3 of Protocol 1 where a Russian-speaking candidate in Latvia could not run for office because she did not pass an examination testing her proficiency in the Latvian language). The Court found that though language proficiency is a legitimate aim, the language test was not carried out with the necessary procedural safeguards, and that this action violated the substantive requirements of Article 3 of Protocol 1. The court thus did not proceed to an Article 14 analysis. *Id.*

82. See, e.g., *Mathieu-Montin & Clerfayt*, 113 Eur. H.R. Rep. (ser. A) at 26 (holding that there was no violation of Article 3 of Protocol 1 where candidates elected to the Flemish Council had to take their oaths in Dutch because the policy pursued a legitimate aim, and analysis under Article 14 was unnecessary because it rested on the same arguments).

83. See *D.H. & Others v. the Czech Republic*, 47 Eur. H.R. Rep. 3, ¶ 176 (2008) (noting that racial and ethnic classifications are particularly dangerous and require that authorities be especially sensitive to differences in treatment on this basis).

Protocol 1 where the Cypriot Constitution divided the legislature between Turks and Greeks, with different electoral rolls, after which the Turkish representatives then withdrew and set up their own government in northern Cyprus.⁸⁴ The applicant in *Aziz* was a Turk living in Greek Cyprus who was denied the right to vote for representation in the legislature of Greek Cyprus.⁸⁵

The European Court in *Aziz* held that it will consider an Article 14 claim in conjunction with Article 3 of Protocol 1, rather than only focusing on the latter, if inequality in the enjoyment of a right is “a fundamental aspect of the case.”⁸⁶ The Court noted that because the differential treatment based on *Aziz*'s ethnicity and domicile resulted in his absolute exclusion from legislative election and the state could provide no “reasonable and objective justification” for the treatment, the inequality in question was a fundamental aspect of the case, and there was a violation of Article 14 in conjunction with Article 3 of Protocol 1.⁸⁷

The European Court found electoral discrimination under Protocol 12 for the first time in Sejdić and Finci, striking down electoral discrimination in the BiH Constitution.⁸⁸ In *Sejdić and Finci*, the Court declared that the same line of reasoning used in Article 14 discrimination jurisprudence would apply to Protocol 12 discrimination cases as well.⁸⁹ The Court focused on the

84. *Aziz v. Cyprus*, 2004-V Eur. Ct. H.R. 201, 209–14 (holding that electoral discrimination existed where election to the legislature was based on both ethnicity and residence within a given territory).

85. *See id.* at 214 (noting that, because of his ethnicity and his place of residence, the applicant was effectively denied all electoral rights).

86. *See id.* (observing that, in *Aziz*'s case, the discrimination claim was not identical to the electoral rights claim; it was a central and separate aspect of the case).

87. *See id.* (emphasizing that the circumstances of this case, combined with the State's unwillingness to affirmatively provide equal treatment for *Aziz*, effectively meant that *Aziz* had no right to vote for representation).

88. *See Sejdić & Finci v. Bosnia & Herzegovina*, Apps. Nos. 27996/06 & 34836/06, 2009 Eur. Ct. H.R. 1, 38–39 (holding a violation of Article 1 of Protocol 12 where a Jew and a Roma were barred from election to the Presidency and the House of Peoples under the Constitution of BiH); *see also* Wakely, *supra* note 63, at 251–52 (noting that *Sejdić and Finci* was the first case where the European Court had considered an Article 1 of Protocol 12 claim).

89. *See Sejdić & Finci*, 2009 Eur. Ct. H.R. at 35 (remarking that analysis for Article 14 and Protocol 12 will be the same because the meaning behind them is the same).

proportionality prong of its discrimination analysis to determine that BiH lacked an objective and reasonable justification for discrimination regarding election to the House of Peoples and the Presidency.⁹⁰ The Court took into account several factors in concluding that the discriminatory measures under BiH law were no longer proportionate to a legitimate aim, which included: the positive developments toward peace in BiH since 1995; the ability to structure power-sharing in a way to include “Others”; BiH’s own goals for EU accession; and BiH’s experience with amending its Constitution in 2009.⁹¹

Sejdić and Finci is significant for two reasons. First, it was the first time that the Court applied the general prohibition on discrimination under Protocol 12, and it made clear that analysis under this provision would be identical to that used for Article 14.⁹² Second, it solidified the Court’s jurisprudence with regard to electoral discrimination based on ethnicity: where differential treatment is based on ethnicity, the Court will require a narrow fit between the “legitimate aim” proffered by the state and the means used to achieve that aim.⁹³ Though the European Court decided *Sejdić and Finci* after the BiH Constitutional Court decided *Pilav*, it used the same line of reasoning that it had applied in previous electoral discrimination cases. The BiH Constitutional Court should have relied on this line of reasoning in *Pilav*.⁹⁴

III. ANALYSIS

While the BiH Constitutional Court would have been justified in

90. *See id.* at 33 (posturing that it was unnecessary to decide whether discrimination under the BiH Constitution pursued a legitimate aim because, in any case, it fails the proportionality test).

91. *See id.* (holding that the exclusion of minorities from certain offices was justified at the time of the drafting of the Constitution, but could no longer be considered means proportionate to a legitimate aim based largely on these factors).

92. *See id.* at 35 (reasoning that because the meaning of the term “discrimination” in Article 1 of Protocol 12 was intended to be identical to that in Article 14, the analysis applied to these provisions must be identical as well).

93. *See id.* at 32 (stating that where discrimination is based on race or ethnicity, the justification for such discrimination will be interpreted strictly).

94. *See id.* (citing to the *Belgian Linguistics Case* for the discrimination test and *D.H. & Others* for the rule that justification for ethnic discrimination must be interpreted as strictly as possible).

ruling against Pilav based on lack of jurisdiction to strike down constitutional provisions, it nevertheless chose to decide the case on its merits.⁹⁵ However, the BiH Constitutional Court erred by applying European Court jurisprudence on electoral rights and neglecting to consider its jurisprudence on ethnic discrimination.⁹⁶ The Constitutional Court should have applied the standards set forth by the European Court in *Aziz*, which relied on discrimination jurisprudence.⁹⁷ Were the European Court to take the *Pilav* case, it would rule in favor of Pilav, consistently with *Sejdić and Finci* and *Aziz*.

A. THE BIH CONSTITUTIONAL COURT ERRED IN ITS REASONING IN *PILAV* BY APPLYING THE EUROPEAN COURT'S ELECTORAL RIGHTS JURISPRUDENCE, RATHER THAN ITS DISCRIMINATION JURISPRUDENCE

The Court in *Pilav* should have applied the European Court's Article 14⁹⁸ discrimination standard, rather than relying solely on its Article 3 of Protocol 1⁹⁹ electoral rights standard. The Court was justified in failing to undertake general discrimination analysis under Protocol 12,¹⁰⁰ which Pilav pled, because the European Court had not yet decided *Sejdić and Finci*, so the Court had no precedent in this

95. See *Stranka za Bosnu i Hercegovinu v. Pilav* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Sept. 29, 2006, No. AP-2678/06 at 7 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=67930 (noting that because the claims in Pilav's appeal were not *prima facie* invalid, his appeal was admissible and would be decided on its merits).

96. See *id.* at 9 (observing that under European Court jurisprudence, the enjoyment of electoral rights is subject to limitations imposed at the discretion of the state).

97. See *Aziz v. Cyprus*, 2004-V Eur. Ct. H.R. 201, 214 (holding that the Court will assess electoral discrimination claims using its discrimination jurisprudence rather than its electoral rights jurisprudence where discrimination, especially that based on ethnicity or race, is a "fundamental aspect of the case").

98. See European Convention, *supra* note 42, art. 14 (providing a prohibition on discrimination with regard to the rights set forth in the European Convention).

99. See *id.* at Protocol No. 1, art. 3 (guaranteeing electoral rights, which include the rights to vote and stand for office, with regard to election to the legislature).

100. See *id.* at Protocol No. 12, art. 1 (providing a general prohibition on discrimination with regard to any right under any law).

regard upon which to base its judgment.¹⁰¹ However, the BiH Constitutional Court chose to analyze only Pilav's electoral rights claims, without also considering the discrimination claims.¹⁰² As *Aziz* confirmed, a Court should consider both the electoral rights claims and the discrimination claims (instead of only the former) where inequality of treatment is "a fundamental aspect of the case."¹⁰³

1. The BiH Constitutional Court Erred in Relying on the European Court's Electoral Rights Jurisprudence

The BiH Constitutional Court was incorrect to apply the European Court's electoral rights jurisprudence without giving appropriate consideration to Pilav's discrimination claims.¹⁰⁴ Article 3 of Protocol 1 to the European Convention does not apply to elections for executive offices.¹⁰⁵ The Court in *Pilav* acknowledged that Article 3 of Protocol 1 applies only to elections to legislatures, but chose to apply it in this case anyway, in spite of the fact that Pilav's claims pertained only to election to the Presidency.¹⁰⁶ The Court also noted that the European Convention grants states considerable discretion in setting up their electoral systems.¹⁰⁷

The BiH Constitutional Court erred in citing as authority for its

101. See *Sejdić & Finci v. Bosnia & Herzegovina*, Apps. Nos. 27996/06 & 34836/06, 2009 Eur. Ct. H.R. 1, 35 (acknowledging that the Court had never analyzed a Protocol 12 claim before, and deciding to apply Article 14 analysis).

102. *Stranka za Bosnu i Hercegovinu v. Pilav* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Sept. 29, 2006, No. AP-2678/06 at 10 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=67930.

103. See *Aziz v. Cyprus*, 2004-V Eur. Ct. H.R. 201, 214 (concluding that *Aziz's* complete disqualification from voting based on his Turkish ethnicity as a resident of Greek Cyprus was a central aspect of the case).

104. See *Pilav*, No. AP-2678/06 at 10 (providing an extensive overview of the European Court's electoral rights cases, but not citing to any discrimination cases).

105. See European Convention, *supra* note 42, at Protocol 1, art. 3 (referencing voting rights with regard to the legislature but no other political office).

106. See *Pilav*, No. AP-2678/06 at 10 (arguing that conclusions of the European Court made under Article 3 of Protocol 1 could similarly be applied to Pilav's case, thereby granting the state a wide margin of discretion in restricting electoral rights).

107. *Id.* at 9 (citing *Mathieu-Mohin & Clerfayt v. Belgium*, 113 Eur. H.R. Rep. (ser. A) at 23 (1987)) (stating that the European Court will uphold whatever restrictions states choose to apply to electoral rights, provided that the restrictions do not render the rights entirely ineffective, that they serve a legitimate purpose, and that they are not disproportionate to that purpose).

reasoning cases that were not analogous to Pilav's case. As authority, the Court cited *Gitonas and Others vs. Greece* and *Ždanoka vs. Latvia*, neither of which involved any claims of discrimination.¹⁰⁸ The applicants in these cases only claimed violations of their substantive electoral rights under Article 3 of Protocol 1, without making any concurrent claims with regard to discrimination.¹⁰⁹ These cases were therefore subject to an entirely different line of reasoning than *Pilav*, which was a case alleging both ethnic discrimination and violation of electoral rights under Article 1 of Protocol 12.¹¹⁰ The BiH Constitutional Court therefore erred in citing cases that involved only restrictions on electoral rights, rather than electoral discrimination.

In addition to the error the Constitutional Court made in applying Article 3 of Protocol 1 without due consideration of Pilav's discrimination claim, the Court did not even apply Article 3 of Protocol 1 consistently with the European Court's jurisprudence. When deciding Article 3 of Protocol 1 claims, the European Court considers whether the restrictions imposed limit electoral rights to the extent that they are no longer effective; whether the restrictions are imposed in pursuit of a legitimate aim; and whether the means used are proportionate to that aim.¹¹¹ The Constitutional Court erred on each of these three points.

First, the Court did not examine whether the restrictions of the

108. See *Ždanoka v. Latvia*, 2006-IV Eur. Ct. H.R. 29 (holding no violation of Article 3 of Protocol 1 because state authorities are better placed than the European Court to determine whether restrictions imposed on electoral rights are necessary under the circumstances); *Gitonas & Others v. Greece*, 1997-IV Eur. Ct. H.R. 1217 (holding no violation of Article 3 of Protocol 1 because electoral rights are not absolute, the restrictions in question were prescribed by law, and that law was not disproportionate or arbitrary).

109. See *Ždanoka*, 2006-IV Eur. Ct. H.R. at 58 (claiming a violation of Article 3 of Protocol 1 where a candidate could not run for public office if he/she participated in Communist activities after January 1991); *Gitonas*, 1997-IV Eur. Ct. H.R. at 1232 (claiming a violation of Article 3 of Protocol 1 where candidates were barred from office if they had held public office in the previous three years).

110. See *Pilav*, No. AP-2678/06 at 4 (claiming discrimination under Article 1 of Protocol 12 by itself, rather than under Article 14 with Article 3 of Protocol 1 because Article 3 of Protocol 1 only applies to legislatures).

111. See *Mathieu-Mohin & Clerfayt v. Belgium*, 113 Eur. H.R. Rep. (ser. A) at 23 (1987) (noting that the placement of restrictions on electoral rights is not *per se* a violation of Article 3 of Protocol 1, and providing a test for determining whether such restrictions violate electoral rights).

Constitution and the Election law curtailed electoral rights to the point of depriving them of their effectiveness. Second, the Court cited preservation of peaceful conditions and the creation of an environment for dialogue that could lead to future constitutional reforms as the “legitimate aim” for imposing restrictions on the right to run for office.¹¹² However, this “aim” is nebulous, as conditions in BiH have improved since the war ended in 1995¹¹³ and the divisive constitutional structure of the Dayton Peace Agreement is now impeding, rather than fostering, further progress.¹¹⁴ Third, the Court in *Pilav* did not engage in any meaningful analysis related to proportionality.¹¹⁵ Therefore, not only did the Constitutional Court use an inapplicable provision to justify its decision, it applied it in an incorrect and incomplete manner.

*2. The BiH Constitutional Court Should Have Applied the
Discrimination Standard that the European Court Applied in Aziz*

The BiH Constitutional Court should have applied the analysis used for Article 3 of Protocol 1 taken in conjunction with Article 14, as it was applied in *Aziz*.¹¹⁶ Even before *Sejdić and Finci*, the

112. See *Pilav*, No. AP-2678/06 at 10–11 (arguing that the ethnic-based restrictions on electoral rights in BiH are proportional to the proffered aims).

113. See *id.* at 16 (Grewe, J., dissenting) (stating that conditions in BiH no longer justify continued electoral discrimination and that less restrictive means could be used to preserve the peace in BiH).

114. See Eur. Parl. Ass., *Rep. of the Comm. on the Honouring of Obligations and Commitments by Member States of the Council of Europe: The Functioning of Democratic Institutions in Bosnia and Herzegovina*, Doc. No.12816, ¶ 44 (Jan. 9, 2012) (referring to the Dayton Constitution as a “straightjacket” that has been tightened by ethno-nationalist politicians, leading to obstructionism and political deadlock); see also EDIN HODZIC & NENAD STOJANOVIC, NEW/OLD CONSTITUTIONAL ENGINEERING? 26 (2011) (referring to the BiH Constitutional Court’s logic as “paradoxical” for thinking that upholding discrimination will eventually eliminate discrimination in BiH); Robinson & Sito-Sucic, *supra* note 54 (reporting that the Dayton state structure, which was originally intended to be phased out over time, is now deepening ethnic divisions and could lead to conflict in the future if BiH does not move forward with constitutional reform).

115. See *Pilav*, No. AP-2678/06 at 10 (stating vaguely, with regard to proportionality, that differential treatment is “justified at this moment since there is a reasonable justification for such treatment”).

116. See *Aziz v. Cyprus*, 2004-V Eur. Ct. H.R. 201, 214 (holding a violation of Article 3 of Protocol 1 taken with Article 14 where the Constitution of Cyprus divided the legislature between Turks and Greeks, with different electoral rolls; the Turkish representatives withdrew from the government and set up their own

European Court made it very clear that distinctions based on ethnicity and race will be scrutinized more thoroughly by the Court.¹¹⁷ *Sejdić and Finci* established that in cases of ethnic discrimination, the Court will give less deference to states, and will require a tighter fit between the aim of the discrimination and the means taken to achieve that aim.¹¹⁸ The case most similar to *Pilav* in this regard is *Aziz*, on which the Court should have relied by applying Article 3 of Protocol 1 with Article 14, rather than the former alone.¹¹⁹

The *Aziz* case is similar to *Pilav* in that both cases involve applicants whose electoral rights were restricted based on both their ethnicity and domicile within a given territory.¹²⁰ In *Aziz*, the applicant was a Cypriot Turk living in Greek Cyprus who, under the Cypriot Constitution, could not participate in legislative elections after the Turks withdrew from the legislature.¹²¹ The European Court in *Aziz* found a violation of Article 3 of Protocol 1, together with Article 14, on the basis that there was no objective and reasonable justification for the differential treatment of Turks living in Greek Cyprus.¹²² Central to the Court's conclusion were (1) the fact that the distinction was based on ethnicity; and (2) that the restriction

government in northern Cyprus; and the applicant, a Turk living in Greek Cyprus, was denied the right to vote for representation based on his ethnicity).

117. See, e.g., *D.H. & Others v. the Czech Republic*, 47 Eur. H.R. Rep. 3, 117 (2008) (noting that discrimination based on ethnicity or race should be examined carefully because it is an especially offensive type of discrimination).

118. See Wakely, *supra* note 63, at 247 (citing *Sejdić & Finci* and observing that the European Court is gravitating toward strict treatment of the proportionality principle in cases of ethnic discrimination).

119. See *Aziz*, 2004-V Eur. Ct. H.R. at 214 (finding a violation of Article 3 of Protocol 1 with Article 14 where the applicant was barred from voting in an election due to the combination of his ethnicity and his domicile in a given territory).

120. Compare *id.* at 209 (claiming electoral discrimination where the applicant was a Turk living in Greek Cyprus), with *Pilav*, No. AP-2678/06 at 3 (claiming electoral discrimination where the applicant was a Bosniak living in the Serb entity of BiH).

121. See *Aziz*, 2004-V Eur. Ct. H.R. at 210 (citing the Cypriot government's argument that *Aziz's* inability to vote was not based on his ethnicity, but was purely circumstantial after the Turkish withdrawal to the north).

122. See *id.* at 212 (observing that the state could not point to the circumstances—where the Turks withdrew from the government and occupied northern Cyprus—as reasonable justification for withholding the right to vote from the Turks who remained in southern Cyprus).

effectively meant that the applicant could not vote in any legislative election, and the state therefore deprived Aziz of the very essence of his electoral rights under Article 3 of Protocol 1.¹²³

Similarly, Pilav, a Bosniak living in the RS, had no right to run for office at the national level because of the ethnic distinctions in the BiH Constitution.¹²⁴ However, despite their similarities in fact and law, the BiH Constitutional Court in *Pilav* did not even consider *Aziz* as an authority for this case.¹²⁵ Though *Aziz* involved the right to vote and *Pilav* involves the right to stand for office, the European Court holds that both of these rights are implicit in the electoral rights guaranteed by the European Convention.¹²⁶ In these ways, the *Pilav* Court's reasoning was flawed.

B. THE BIH CONSTITUTIONAL COURT WAS JUSTIFIED
IN RULING AGAINST PILAV BASED ON LACK OF JURISDICTION
AND ITS OWN PRECEDENT

Even if the BiH Constitutional Court had found electoral discrimination under the European Convention in *Pilav*, it rightfully ruled against Pilav because it does not have the jurisdiction to overturn provisions of the Constitution. While the BiH Constitutional Court can interpret the compatibility of the laws of BiH and its entities with the Constitution and the European Convention, it cannot invalidate constitutional provisions.¹²⁷ In the *Tihic* cases, where the Court was asked to determine compatibility of the Constitution and the Electoral Law with the European Convention, the Court held that

123. *See id.* at 214.

124. *See Pilav*, No. AP-2678/06 (citing BOSN. & HERZ. CONSTITUTION, *supra* note 7, art. V) (acknowledging that the provisions regarding election to the Presidency are restrictive in character and exclude candidates based on ethnicity and entity citizenship, but arguing that they are necessary for strengthening and protecting the positions of the constituent peoples).

125. *See id.* at 9 (citing only to electoral rights cases, such as *Gitonas* and *Ždanoka*, rather than discrimination cases, such as *Aziz*).

126. *See Sukhovetsky v. Ukraine*, 2006-VI Eur. Ct. H.R. 193, 206 (holding that the right to stand for election is implied in Article 3 of Protocol 1, even though this provision only explicitly refers to the right to freely elect legislative representatives).

127. *See BOSN. & HERZ. CONSTITUTION*, *supra* note 7, art. VI (granting the Constitutional Court jurisdiction over conflicts between the laws of BiH and the European Convention, but not jurisdiction over conflicts between the BiH Constitution and the European Convention).

it did not have the jurisdiction to decide on conflicts between the Constitution and European Convention.¹²⁸ In doing so, it relied on Article VI of the BiH Constitution, which provides that the Court's jurisdiction is limited to upholding the Constitution, as justification for declining to strike down provisions of the Constitution that conflict with international instruments.¹²⁹

Furthermore, although the Constitution provides in Article II that the European Convention shall apply directly in BiH,¹³⁰ the Court held in the *Tihić U-13/05* case that a caveat to this is that the Constitution is still superior to the European Convention in BiH.¹³¹ The reasoning behind this is that the Constitution, by including a provision regarding direct application of the European Convention, grants BiH the rights and privileges provided in the European Convention; these rights thereby derive from the Constitution, rather than the European Convention.¹³² Because the Constitution is superior to the European Convention and the Constitutional Court must uphold the Constitution, the Constitutional Court lacks the jurisdiction to strike down provisions of the Constitution based on their incompatibility with the European Convention.¹³³ Therefore, the

128. See *Tihić* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Mar. 31, 2006, No. U-5/04 at 8 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=37994 (dismissing the complaint because determining the compatibility of the Constitution with the European Convention is outside the Court's jurisdiction); *Tihić II*, [Ustavni Sud BiH] (Constitutional Court of Bosnia and Herzegovina) May 26, 2006, No. U-13/05 at 5 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=43087 (dismissing the complaint because the Election Law is based directly on the Constitution, and the Court does not have the jurisdiction to determine the compatibility of the Constitution with the European Convention).

129. See *Tihić II*, No. U-13/05 at 5 (explaining specifically that, "when interpreting its jurisdiction, [this Court] must always abide by the text of the Constitution of Bosnia and Herzegovina").

130. See BOSN. & HERZ. CONSTITUTION, *supra* note 7, art. II (mandating that the European Convention have priority over BiH law).

131. See *Tihić II*, No. U-13/05 at 5 (holding that the Constitution takes precedence over the European Convention because the latter derives its applicability in BiH from the former).

132. See *id.* (stating that the European Convention only went into force in BiH by virtue of its inclusion in the Constitution, and that the latter thus necessarily overrules the former).

133. See *id.* (declining to determine the compatibility of the Election Law with the European Convention because the challenged provisions in the latter are derived directly from the Constitution, and the Constitution must be held superior

Court in *Pilav* could have dismissed the case based on lack of jurisdiction, as it did in the *Tihic* cases.¹³⁴

Based on precedent, the Constitutional Court also could have dismissed Pilav's claims of discrimination under the European Convention by arguing that the BiH Constitution takes precedence over the European Convention.¹³⁵ Instead, the *Pilav* case serves to illustrate the lack of consensus in judicial opinion on the status of international law in BiH.¹³⁶ In *Pilav*, the applicants raised the arguments that the European Convention should be applied directly to the case and that the European Convention is on equal standing with the Constitution.¹³⁷ However, the *Pilav* majority ignored this request and sidestepped the issue of constitutional superiority entirely.¹³⁸

Nevertheless, the separate opinions of individual judges show that the BiH Constitutional Court's judges disagree about constitutional supremacy and the Constitutional Court's role in this regard.¹³⁹ Judge

to the European Convention).

134. See *Tihic* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Mar. 31, 2006, No. U-5/04 at 1 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=37994; *Tihic*, No. U-13/05 at 1.

135. See *Tihic*, No. U-13/05 at 5.

136. Compare *id.* (holding that because the BiH Constitution is superior to the European Convention, it was unnecessary to determine whether the provisions relating to election to the House of Peoples and the Presidency in the Constitution and Election law were compatible with the European Convention), with *Stranka za Bosnu i Hercegovinu v. Pilav* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Sept. 29, 2006, No. AP-2678/06 at 12 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=67930 (deciding on the merits of the case that the provisions relating to election to the House of Peoples and the Presidency in the Constitution and Election law were compatible with the European Convention, based on European Court jurisprudence).

137. See *Pilav*, No. AP-2678/06 at 5 (arguing that the European Convention has applied directly to BiH since the state was created and is at least equal to the BiH Constitution, rather than deriving its powers from the Constitution).

138. See *id.* (summarizing the applicants' argument with regard to the superiority of the European Convention, without directly analyzing it).

139. Compare *id.* at 17 (Grewe, J., dissenting) (stating that the European Convention and its Protocols are at least equal in authority to the BiH Constitution), with *id.* at 14 (Feldman, J., concurring) (noting that where the BiH Constitution conflicts with the European Convention, the Court must always uphold the Constitution, and cannot render a decision that would leave any part of the Constitution ineffective).

Feldman (an international judge), in the second of *Pilav's* two separate opinions, concurs with the majority opinion on the basis of the BiH Constitution's superiority vis-à-vis the European Convention, and the Constitutional Court's duty to uphold the Constitution over European Convention.¹⁴⁰ However, his opinion also hints that the European Court could strike down these provisions, given the Constitutional Court's jurisdictional restrictions.¹⁴¹ Indeed, the European Court did precisely that in *Sejdić and Finci*.¹⁴² Moreover, that the majority in the *Pilav* opinion relied so heavily (albeit with error) on European Court jurisprudence regarding electoral rights implies, at the very least, that the BiH Constitutional Court views European case law as applicable precedent for human rights cases in BiH.¹⁴³

Given the Constitutional Court's precedents with regard to the European Convention and the still-uncertain relationship between the Constitution and the European Convention in BiH, it would have been understandable for the Court in *Pilav* to rule that it does not have the jurisdiction to strike down constitutional provisions, even if they are discriminatory under the European Convention.¹⁴⁴

C. THE EUROPEAN COURT WOULD RULE IN FAVOR OF PILAV, IN LIGHT OF *SEJDIĆ AND FINCI*

If the *Pilav* case was before the European Court, the court would

140. *See id.* at 14 (Feldman, J., concurring) (concurring that the Constitutional Court is required by law to uphold the Constitution as it is written).

141. *See id.* (Feldman, J., concurring) ("The European Court of Human Rights might perhaps decide that the constitutional arrangements for electing members of the Presidency violate rights under the European Convention (and nothing I write here should be taken to lend support to that suggestion under present conditions).").

142. *See Sejdić & Finci v. Bosnia & Herzegovina*, Apps. Nos. 27996/06 & 34836/06, 2009 Eur. Ct. H.R. 1, 32–34 (striking down Articles IV and V of the BiH Constitution as incompatible with Article 14, Article 3 of Protocol 1, and Article 1 of Protocol 12 to the European Convention).

143. *See Pilav*, No. AP-2678/06 at 9 (citing several European Court cases on electoral rights as the basis for determining that BiH should be given a wide margin of deference with regard to its electoral system).

144. *See id.* at 12 (deciding the case on the merits, thereby avoiding the issues of the Court's jurisdiction and the relationship between the Constitution and the European Convention).

rule in favor of Pilav on similar grounds as it ruled in *Sejdić and Finci* and *Aziz*.¹⁴⁵ The only factual difference between the *Sejdić and Finci* and *Pilav* cases is that the Sejdić and Finci Petitioners were “Others” under the BiH Constitution, meaning that they were not members of the Serb, Croat, or Bosniak ethnic groups, and therefore had no right to run for Election to the House of Peoples or the Presidency.¹⁴⁶ Pilav, on the other hand, is a Bosniak living in the RS, and though based on his ethnicity alone he is allowed to run for the Bosniak seat of the Presidency, he is barred from the Bosniak seat due to his RS citizenship.¹⁴⁷

It is this mix of ethnic and territorial requirements (rather than solely ethnic, as in *Sejdić and Finci*) that the European Court analyzed in *Aziz*, and would also apply in *Pilav*.¹⁴⁸ In *Aziz*, the applicant was barred from voting for any legislative representation because he was a Turk living in the Greek area of Cyprus.¹⁴⁹

145. See ŠEHIĆ ET AL., *supra* note 14, at 66 (arguing that *Sejdić and Finci* is applicable to *Pilav*, even though the former involved minorities (a Jew and a Roma) and the latter involved constituent peoples (a Bosniak)).

146. See BOSN. & HERZ. CONSTITUTION, *supra* note 7, arts. IV–V (1995) (providing that only Serbs from RS and Bosniaks and Croats from the Federation may be elected to the House of Peoples and the Presidency); see also *Sejdić & Finci v. Bosnia & Herzegovina*, Apps. Nos. 27996/06 & 34836/06, 2009 Eur. Ct. H.R. 1 (noting that as a Roma and Jew, respectively, Sejdić and Finci were barred from election to the House of Peoples and the Presidency).

147. See *Pilav*, No. AP-2678/06 at 3 (noting that though Pilav is a Bosniak and the Presidency has a seat reserved for Bosniaks, Pilav’s RS citizenship meant that his only option to run for this office was to contest the Serb seat of the Presidency, which the Central Election Commission barred him from doing based on the Constitution and the Election Law).

148. Compare *Sejdić & Finci*, 2009 Eur. Ct. H.R. at 33–34 (finding that preventing people classified as “Other” from standing for election breached Article 14 taken in conjunction with Article 3 of Protocol 1), with *Aziz v. Cyprus*, 2004-V Eur. Ct. H.R. 201, 214 (noting that it was a combination of the applicant’s Turkish ethnicity and territorial placement in Greek Cyprus that precluded him from voting by law, which the Court used as the basis for finding that the applicant was deprived of the very essence of his electoral rights under Article 3 of Protocol 1), and *Pilav*, No. AP-2678/06 at 17 (Grewe, J., dissenting) (remarking that as a Bosniak, Pilav was guaranteed equality in BiH, but it was the combination of ethnic and territorial requirements that precluded him from election to the Presidency as a Bosniak citizen of RS) (emphasis added).

149. See *Aziz*, 2004-V Eur. Ct. H.R. at 212 (observing that Aziz’s inability to vote for representation stemmed from constitutional provisions that became ineffective after the Turks withdrew from the Cypriot government, and that no legislative solutions were subsequently adopted).

Likewise, in *Pilav*, the applicant is barred from running for election to the House of Peoples and the Presidency because he is a Bosniak living in the Serb area of BiH.¹⁵⁰ Given the factual similarities between *Pilav*, *Sejdić and Finci*, and *Aziz*, the European Court would likely apply the discrimination test applied that it applied in *Sejdić and Finci* and *Aziz*, rather than the electoral rights analysis that the BiH Constitutional Court relied on in *Pilav*.¹⁵¹

If the European Court took the *Pilav* case, it would likely take the case as an opportunity to reiterate that ethnic discrimination in Europe is not tolerated. *Aziz* and *Sejdić and Finci* show that the European Court's discrimination jurisprudence is evolving; it is taking an increasingly narrow view of what constitutes a reasonable justification for differential treatment, particularly as it relates to ethnic discrimination.¹⁵² Because differential treatment in BiH's Constitution and state structure was necessary for the preservation of peace at the time of creation and peace in BiH has been unstable since 1995 due to political tensions between ethnic groups, BiH could argue that there is reasonable justification for the differential treatment in *Pilav*.¹⁵³

150. See *Pilav*, No. AP-2678/06 at 4 (citing BOSN. & HERZ. CONSTITUTION, *supra* note 7, art. V) (providing that Bosniaks can only be elected to the Presidency if they are residents of the Federation).

151. See *Aziz*, 2004-V Eur. Ct. H.R. at 214 (engaging in discrimination analysis because inequality of treatment was a fundamental aspect of the case, and finding no reasonable or objective justification for the discrimination); see also *Sejdić & Finci*, 2009 Eur. Ct. H.R. at 32 (noting that the reasonable and objective justification analysis must be interpreted strictly where distinctions are based on ethnicity, and holding that BiH failed the proportionality prong of that test because the means employed were not proportionate to the proffered aim). *But see Pilav*, No. AP-2678/06 at 9 (focusing on the European Court's electoral rights jurisprudence to find that BiH should have a wide margin of discretion with regard to its electoral system, and providing only cursory analysis of the discrimination claims).

152. See Wakely, *supra* note 63, at 254 (noting that *Sejdić and Finci* advanced case law in favor of minorities, and that the European Court is now likely to limit the circumstances under which it will allow for discrimination, even where a reasonable and objective justification is present).

153. See VLADO AZINOVIC ET AL., ASSESSING THE POTENTIAL FOR RENEWED ETHNIC CONFLICT IN BOSNIA AND HERZEGOVINA: A SECURITY RISK ANALYSIS 15 (2011) (noting that the use of hate speech, references to the war, and threats of secession are common political tools in BiH, which have been on the rise since 2006); see also *Republika Srpska's Dodik Says He's 'Only Supporting the Constitution,'* RADIO FREE EUROPE/RADIO LIBERTY (Oct. 14, 2011),

However, the Court held in *Sejdić and Finci* that in democratic states, even severe ethnic tensions cannot justify prohibiting an otherwise qualified applicant from contesting seats in the legislature and presidency.¹⁵⁴ Therefore, given its decisions in *Aziz* and *Sejdić and Finci*, the European Court would likely apply its discrimination test—looking at whether differential treatment has an objective and reasonable justification, which means that it pursues a legitimate aim, and the means employed are proportionate to the aim pursued—and hold that Pilav's inability to run for the House of Peoples and Presidency is unjustifiable discrimination.¹⁵⁵

Moreover, with regard to the jurisdictional questions surrounding the *Tihic* cases and *Pilav*, the European Court in *Sejdić and Finci* interpreted Article II of the BiH Constitution to mean that the European Convention takes precedence over Bosnian law.¹⁵⁶ As justification for this conclusion, it observed that the international lawyers who drafted the BiH Constitution acknowledged that several provisions conflicted with international human rights instruments and included Article II, which provides that the European Convention applies directly in BiH, to support their eventual phasing out.¹⁵⁷ Additionally, the European Court hinted that the BiH Constitutional Court no longer assumes that the Constitution takes precedence over the European Convention.¹⁵⁸

http://www.rferl.org/content/interview_milorad_dodik_bosnia_republika_srpska_politics/24360012.html (interviewing RS President Milorad Dodik, who claims that the current political crisis is to be expected of a state whose Constitution is ethnically-focused and which is essentially a failed political experiment of the international community).

154. See *Sejdić & Finci*, 2009 Eur. Ct. H.R. at 33 (acknowledging that ethnic tension is still a problem in BiH but focusing on the positive developments toward peace since 1995).

155. See *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 6 Eur. Ct. H.R. (ser. A) at 34 (1968) (holding that differential treatment does not *per se* constitute discrimination, provided it is reasonably and objectively justified).

156. See *Sejdić & Finci*, 2009 Eur. Ct. H.R. at 9 (citing BOSN. & HERZ. CONSTITUTION, *supra* note 7, art. II) (providing that the European Convention applies directly in BiH and has priority over all other laws therein).

157. See *id.* at 8 (observing that Article II was included in the BiH Constitution under the assumption that the Constitution would evolve over time but that the European Convention would always take priority).

158. See *id.* at 9 (citing the decision of the BiH Constitutional Court in *Pilav* to consider the case on its merits, rather than dismiss the claim for lack of jurisdiction).

Therefore, the European Court in *Pilav* would similarly conclude that the European Convention takes precedence over the BiH Constitution. Moreover, assuming that constitutional reforms were not undertaken to remove the type of discrimination present in the *Pilav* case, the European Court would almost certainly rule in Pilav's favor.

IV. RECOMMENDATIONS

The Constitution of BiH is discriminatory with regard to electoral rights, and the BiH Constitutional Court is both unwilling and unable to overturn Articles IV and V, which provide for this discrimination.¹⁵⁹ Therefore, if BiH is to continue as a member of the Council of Europe, the European Court and the Council of Europe should address discrimination in BiH to the extent they are able. The European Court should take the *Pilav* case and rule in favor of Pilav, if not to send BiH another message that ethnic discrimination is not tolerated in European states, then to clarify its jurisprudence with regard to Protocol 12. The Council of Europe should take more assertive steps to compel BiH to implement the *Sejdić and Finci* decision, thereby preempting the need for a decision in *Pilav*.

A. THE EUROPEAN COURT SHOULD TAKE THE *PILAV* CASE AS AN OPPORTUNITY TO CLARIFY ITS PROTOCOL 12 JURISPRUDENCE

The *Pilav* case is currently pending before the European Court.¹⁶⁰ However, the European Court is unlikely to take the *Pilav* case in the near future as, in 2010, the Court implemented amended versions of its Rules to reflect a new "priority policy," whereby it will prioritize

as it did in the *Tihic* cases).

159. See *Tihic* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Mar. 31, 2006, No. U-5/04 at 8 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=37994 (dismissing the complaint because invalidating provisions of the Constitution is outside the Court's jurisdiction); see also *Stranka za Bosnu i Hercegovinu v. Pilav* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Sept. 29, 2006, No. AP-2678/06 at 12 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=67930 (holding that discrimination in the Constitution is reasonably justified).

160. See HODZIC & STOJANOVIC, *supra* note 114, at 26 (noting, somewhat optimistically, that it "remains to be seen" how the European Court will treat the *Pilav* case).

the cases it deems the most urgent, important, and relevant to widespread problems.¹⁶¹ Cases deemed “repetitive” are near the bottom of the list of priority categories.¹⁶² Given the similarities between the issues decided in *Sejdić and Finci* and those raised in *Pilav*, the *Pilav* case would likely be considered “repetitive,” and thus low on the Court’s priority list.¹⁶³ Additionally, the Court currently has a backlog of around 150,000 cases, and the authority of the European Court to overrule the decisions and actions of national courts and governments is a topic of debate.¹⁶⁴

Nevertheless, the European Court should take the *Pilav* case, if not to further compel BiH toward constitutional reform, then to clarify its jurisprudence with regard to discrimination under Article 1 of Protocol 12. In light of *Sejdić and Finci*, the Court’s jurisprudence on Protocol 12 remains unclear.¹⁶⁵ A simple analysis of the *Sejdić and Finci* decision could lead to the conclusion that the Court in that case applied Protocol 12 only because election for President is not guaranteed in the European Convention, thereby barring the Court

161. See EUROPEAN COURT OF HUMAN RIGHTS, THE COURT’S PRIORITY POLICY, http://www.echr.coe.int/NR/ronlyres/DB6EDF5E-6661-4EF6-992E-F8C4ACC62F31/0/Priority_policyPublic_communication_EN.pdf (last visited Oct. 9, 2012) (detailing the new priority policy, which creates seven categories for cases, where high priority cases are those that pertain to threats to life and health, and low priority cases are those that are repetitive of earlier decisions or are inadmissible).

162. See *id.* (noting that repetitive cases are those where the Court has already issued a leading judgment on a similar structural problem).

163. See generally Antoine Buyse, *The Court’s New Priority Policy*, EUROPEAN CONVENTION ON HUMAN RIGHTS & FUNDAMENTAL FREEDOMS BLOG (Nov. 17, 2010, 9:53 AM), <http://echrblog.blogspot.com/2010/11/courts-new-priority-policy.html?m=1> (commenting that the European Court’s new priority policy will decrease the Court’s case output, with the result that cases of lower priority could remain on the Court’s docket indefinitely).

164. See Nicholas Watt & Owen Bowcott, *David Cameron Calls for Reform of European Court of Human Rights*, GUARDIAN (Jan. 25, 2012), <http://www.guardian.co.uk/law/2012/jan/25/david-cameron-reform-human-rights> (explaining that United Kingdom Prime Minister David Cameron is leading reform efforts that would make the European Court “subsidiary” to national authorities, and noting that the Parliamentary Assembly of the Council of Europe has expressed its consent to the proposals, as part of a greater effort to clear the backlog of cases at the Court).

165. See Wakely, *supra* note 63, at 252 (commenting that while Article 14 application is restricted to the rights set forth in the European Convention, no similar restriction is placed on Protocol 12, which, after *Sejdić and Finci*, can seemingly apply to any right under any law).

from applying Article 14.¹⁶⁶ Observing states could therefore infer that in the future, the Court will apply Protocol 12 in any case where Article 14 would otherwise restrain it.¹⁶⁷

To date, only six out of 27 European Union Member States and 17 out of 47 Council of Europe Member States have signed Protocol 12.¹⁶⁸ This reflects states' concerns that Protocol 12 could sweep too broadly¹⁶⁹ because the Court could apply it to "any right set forth by law."¹⁷⁰

The European Court should therefore take the *Pilav* case and clarify when and how the Court will apply Protocol 12 and what kind of judicial restraints will be placed on the use of the provision.

B. THE COUNCIL OF EUROPE AND EUROPEAN UNION
SHOULD TAKE CONCRETE STEPS TOWARD COMPELLING
IMPLEMENTATION OF *SEJDIĆ AND FINCI* IN BIH

European officials are applying a "wait and see" policy to BiH with regard to implementation of the *Sejdić and Finci* case.¹⁷¹

166. See *Sejdić & Finci v. Bosnia & Herzegovina*, Apps. Nos. 27996/06 & 34836/06, 2009 Eur. Ct. H.R. 1, 44 (Mijovic, J., partly dissenting and partly concurring) (expressing concern that the Court created no universal standards or tests with regard to Protocol 12 specifically and that the Court's reliance on Article 14 jurisprudence leads to the conclusion that Protocol 12 will be used anywhere that Article 14 cannot be applied).

167. See *id.* (remarking that the Court's failure to engage in any meaningful analysis with regard to Protocol 12 beyond that applied for Article 14 leaves it unclear how the Court will apply this provision in the future).

168. See HANDBOOK ON EUROPEAN NON-DISCRIMINATION LAW, *supra* note 69, at 57 (observing that this effectively creates a legal patchwork across Europe with regard to non-discrimination law, whereby different states have different obligations).

169. See Sandra Fredman, *Why the UK Government Should Sign and Ratify Protocol 12*, EQUAL OPPORTUNITIES REV. 21, 21 (May 2002) (noting that the UK has three primary arguments for not ratifying Protocol 12: (1) it is unclear whether "rights set forth by law" applies solely to national law, or to international law as well; (2) it does not explicitly allow states to offer objective and reasonable justifications for differential treatment; and (3) it does not explicitly allow for positive measures that require differential treatment to rectify past discrimination).

170. European Convention, *supra* note 42, at Protocol 12, art. 1.

171. See Celine Tran, *Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision Sejdić and Finci v. Bosnia and Herzegovina*, 18 AM. UNIV. WASH. COLL. L. HUM. RTS. BRIEF 3, 7 (2011) (observing that the Council of Europe has taken no coercive measures with regard to BiH's implementation of *Sejdić and Finci*, and that it remains to be

However, both the European Court's Protocol 12 jurisprudence and the European anti-discrimination standards generally are at risk of being delegitimized by the European community's failure to compel BiH to implement *Sejdić and Finci*. The Council of Europe ("CoE") and European Union ("EU") should therefore be more forceful with regard to implementation of *Sejdić and Finci* in BiH.¹⁷²

Since the *Sejdić and Finci* decision in 2009, the Parliamentary Assembly of the Council of Europe ("PACE") has passed several resolutions expressing its disappointment over BiH's inability to implement the decision.¹⁷³ However, more forceful action is necessary for BiH to take its ties to the European community and requirements for EU accession seriously.

The CoE has an obligation to compel action in BiH. BiH joined the CoE as a member state in 2002, ratified the European Convention and its Protocols without reservations, and agreed to review its electoral laws and bring them in line with CoE Standards within one year.¹⁷⁴ As a member of the CoE, therefore, BiH has had ten years to implement the changes that were

seen what measures it might take if BiH continues to miss deadlines).

172. See Amanda McCrae, *Protecting Minorities in Bosnia - the EU Has a Role to Play*, HUMAN RIGHTS WATCH (Apr. 20, 2012), <http://www.hrw.org/news/2012/04/20/protecting-minorities-bosnia-eu-has-role-play> (noting that though the EU has conditioned BiH's potential membership on implementation of *Sejdić and Finci*, it has provided BiH with minimal guidance as to what constitutional reforms the EU would accept to allow membership talks to move forward); see also Valerie Hopkins, *Deadline Looms for Bosnia to Reform Constitution*, BALKANINSIGHT (Nov. 30, 2011), <http://www.balkaninsight.com/en/article/deadline-looms-for-bosnia-to-reform-constitution> (noting that the EU and the Council of Europe have accepted minimal changes as evidence of progress in BiH).

173. See, e.g., Eur. Parl. Ass., *Res. 1701*, *supra* note 16, ¶ 5 (expressing concern that BiH has not taken appropriate steps toward revising its Constitution); Eur. Parl. Ass., *Res. 1725 (2010): Urgent Need for Constitutional Reform in Bosnia and Herzegovina*, ¶ 2 (Apr. 29, 2010) (stating that "[t]he Assembly is seriously concerned that the initiatives launched by the authorities so far have not led to any concrete results"); Eur. Parl. Ass., *Res. 1855 (2012): The Functioning of Democratic Institutions in Bosnia and Herzegovina*, ¶ 5 (Jan. 24, 2012) [*hereinafter* Eur. Parl. Ass., *Res. 1855 (2012)*] (emphasizing, "[t]he Assembly reiterates that the *Sejdić and Finci* judgment is legally binding and must be implemented").

174. *Sejdić & Finci v. Bosnia & Herzegovina*, Apps. Nos. 27996/06 & 34836/06, 2009 Eur. Ct. H.R. 1, 34 (citing Eur. Parl. Ass., *Bosnia and Herzegovina's Application for Membership of the Council of Europe*, Doc. No. 9286 (Nov. 20, 2011)).

required as conditions of its membership.¹⁷⁵

The Statute of the CoE provides that any member that is unwilling to fulfill its obligations vis-à-vis the guarantee of fundamental rights and freedoms of its citizens may be asked to withdraw from the CoE.¹⁷⁶ PACE has suspended states in the past, including Belarus, which was given CoE “special guest” status in 1992.¹⁷⁷ In 1997, due to its lack of progress in the fields of democratization and human rights, this status was revoked.¹⁷⁸ Furthermore, in 2012, PACE issued a resolution calling on its members to impose economic sanctions against Belarus, in response to the deteriorating human rights situation there.¹⁷⁹ A similar approach of phased threats and actions could be used with BiH.

In a January 2012 resolution on BiH, PACE stated that progress had to be made on implementing *Sejdić and Finci* by March 15, 2012, or it would consider “further action” against BiH.¹⁸⁰ BiH failed to meet this deadline.¹⁸¹ Therefore, PACE should threaten to suspend

175. See Eur. Parl. Ass., *Report on the Urgent Need for a Constitutional Reform in Bosnia and Herzegovina*, Doc. No. 12222, ¶¶ 8–9 (Apr. 27, 2010) (recalling BiH’s obligation to review its electoral system within a year of accession and expressing dismay at the several failed attempts at constitutional reform since 2002).

176. See Statute of the Council of Europe art. 8, May 5, 1949, C.E.T.S. 001 (providing that any member that violates Article 3 of the statute will lose its right to representation in the CoE).

177. See Eur. Parl. Ass., *Res. 1671(2009): Situation in Belarus*, ¶ 1 (June 23, 2009) (providing an overview of the relationship between Belarus and the Council of Europe from 1992 to 2009).

178. See *id.* (noting that the Parliamentary Assembly of the Council of Europe (“PACE”) was closely following the situation in Belarus as part of the determination of whether or not to accept Belarus’s application for membership, which it froze following the suspension of Belarus’s “special guest” status).

179. See Eur. Parl. Ass., *Res. 1857 (2012): Situation in Belarus*, ¶ 12 (Jan. 25, 2012) (expressing concern over the imprisonment of political dissenters following 2011 elections, and calling on CoE member states to join the sanctions regime of the EU against Belarus).

180. See Eur. Parl. Ass., *Res. 1855 (2012)*, *supra* note 173, ¶ 15 (remarking that *Sejdić and Finci* implementation is of particular importance now; 2012 marked BiH’s ten year anniversary as a member of the CoE).

181. See Elvira Jukic, *Bosnians Fail to Agree to Sejdić-Finci Changes*, BALKANINSIGHT (Mar. 12, 2012), <http://www.balkaninsight.com/en/article/bosnian-leaders-fail-agreement-on-human-rights-ruling> (reporting that the mandate of the BiH parliamentary commission charged with *Sejdić and Finci* implementation expired on March 12, 2012, without an agreement among the relevant parties as to implementation).

BiH's membership; at the very least, more concrete threats on the part of PACE will force BiH to reexamine its relationship with the European community and formulate a shared vision for its future with the CoE and the EU.¹⁸²

Concurrently, the EU should continue to push BiH to make comprehensive, meaningful changes to its Constitution as part of the EU accession process. BiH is a potential candidate for EU membership, and signed a Stabilisation and Association Agreement with the EU in 2008.¹⁸³ However, the EU has made clear that implementation of the *Sejdić and Finci* case is a precondition for EU membership.¹⁸⁴ The EU should leverage BiH's desire to join the EU to compel BiH toward comprehensive constitutional reform that would both implement *Sejdić and Finci* by removing ethnic roadblocks to political participation and create a more modern constitutional structure for BiH.¹⁸⁵

V. CONCLUSION

Though constitutionally mandated electoral discrimination in BiH was justified in the immediate aftermath of the 1992-1995 war, it is no longer justified under current conditions in BiH. The European Court of Human Rights has developed extensive jurisprudence under Article 14 of the European Convention, which justifies discrimination under some circumstances, but it sent a clear message

182. See generally Hopkins, *supra* note 172 (quoting Mary Ann Hennessey, the head of the CoE's Sarajevo Office, as noting that the combination of BiH's failure to implement *Sejdić and Finci* and its looming ten year anniversary in the CoE is raising questions as to whether BiH even wants to remain a member of the CoE).

183. *Key Dates: Milestones on BiH's Road to Europe*, DELEGATION OF THE EUROPEAN UNION TO BOSNIA & HERZEGOVINA, <http://www.delbih.ec.europa.eu/Default.aspx?id=12&lang=EN> (last visited Dec. 18, 2012).

184. See Štefan Füle, Eur. Comm'r for Enlargement and Eur. Neighbourhood Policy, *Address at the Plenary Debate on Bosnia and Herzegovina* at the Eur. Parl. (Mar. 14, 2012), available at http://europa.eu/rapid/press-release_SPEECH-12-191_en.htm?locale=en (recalling that implementation of the Stabilisation and Association Agreement between the EU and BiH is conditioned on BiH making a "credible effort" toward the reforms required by *Sejdić and Finci*).

185. See INT'L CRISIS GRP., BOSNIA'S GORDIAN KNOT: CONSTITUTIONAL REFORM (Europe Briefing No. 68), July 12, 2012, 15-16 (arguing that the EU will create long-term damage in BiH if it accepts "a mere papering-over of the cracks exposed by the European Court" in exchange for EU membership, instead of insisting on more comprehensive constitutional reform).

in *Sejdić and Finci v. Bosnia and Herzegovina* that this type of discrimination would no longer be tolerated for BiH.¹⁸⁶

Prior to *Sejdić and Finci*, the BiH Constitutional Court decided in *Pilav* that electoral discrimination under BiH law was still justified.¹⁸⁷ However, this decision did not fully take into account the European Court's previous jurisprudence on electoral discrimination based on ethnicity, and it did not consider that BiH no longer had a reasonable and objective basis for discrimination based on ethnicity. If the European Court were to take the *Pilav* case, it would issue a ruling similar to *Sejdić and Finci*.

186. See *Sejdić & Finci v. Bosnia & Herzegovina*, Apps. Nos. 27996/06 & 34836/06, 2009 Eur. Ct. H.R. 1, 33 (holding that differential treatment based on ethnicity in Articles IV and V of the BiH Constitution qualifies as discrimination under Article 14, Article 3 of Protocol 1, and Article 1 of Protocol 12 to the European Convention because there is no longer a reasonable and objective justification for the treatment).

187. See *Stranka za Bosnu i Hercegovinu v. Pilav* [Ustavni Sud BiH] [Constitutional Court of Bosnia & Herzegovina] Sept. 29, 2006, No. AP-2678/06 at 11 (Bosn. & Herz.), available at http://www.ccbh.ba/eng/odluke/povuci_pdf.php?pid=67930 (holding that restrictions in Article V of the Constitution and Article 8.1 of the Election Law relating to election to the Presidency have an reasonable and objective justification because they are necessary for the preservation of peace in BiH).